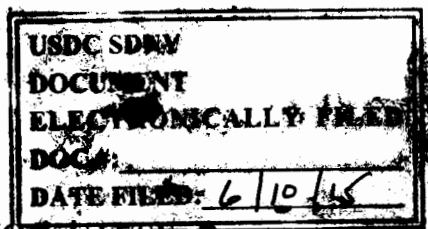


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
: ORDER TO SHOW CAUSE
IN RE WORLD TRADE CENTER LOWER :
MANHATTAN DISASTER SITE LITIGATION : 21 MC 100 (AKH)
:
----- x

ALVIN K. HELLERSTEIN, U.S.D.J.:

WHEREAS, by Order dated January 16, 2015, the Court ordered the Allocation Neutral to authorize a payment of \$10,272,921.52 to the Tier IV Plaintiffs ("January 2015 Disbursement") pursuant to the Settlement Process Agreement, as Amended ("SPA"), constituting both the Fourth Contingent Payment and a sum of previously withheld, and later disallowed, attorneys' fees; and

WHEREAS, the Court authorized a fee to the law firm of Worby Groner Edelman & Napoli Bern LLP ("WGENB") in the amount of \$250,000, plus reasonable expenses, for work performed in connection with the distribution of the January 2015 Disbursement and a Fifth Contingent Payment, if any; and

WHEREAS, WGENB submitted to the Allocation Neutral an invoice of expenses in the amount of \$891,713.70, an amount far in excess of expenses sought in previous years for similar work; and

WHEREAS, the Allocation Neutral conducted an audit of WGENB's submission and submitted a report to the Court summarizing its findings, attached hereto; and

WHEREAS, the Allocation Neutral's audit of WGENB revealed that 97% of the expenses were related to copying costs and document management costs such as imaging, indexing, routing, OCR, and printing; and

WHEREAS, WGENB represented to the Allocation Neutral that a substantial portion of such expenses were incurred in order to transfer files to substituted plaintiffs' counsel

representing plaintiffs before the Victim Compensation Fund and before this Court in the 21 MC 102 litigation and thus not incurred for the benefit of plaintiffs in connection with the 21 MC 100 litigation or the SPA; and

WHEREAS, other expenses reflect costs for which WGENB made no direct expenditure or disbursement and for which no invoice is available; and

WHEREAS, the foregoing expenses appear to be unreasonable and not properly reimbursable by the Tier IV Plaintiffs;

IT IS HEREBY ORDERED that WGENB show cause why the foregoing expenses should not be disallowed.

IT IS HEREBY FURTHER ORDERED that WGENB shall file its objections by June 18, 2015.

SO ORDERED.

Dated: New York, New York
June 9, 2015

A handwritten signature in black ink, appearing to read 'Alvin K. Hellerstein', with a long horizontal flourish extending to the right.

ALVIN K. HELLERSTEIN
United States District Judge



June 10, 2015

Dear Judge Hellerstein:

We write today as the Allocation Neutral in the case *In re World Trade Center Disaster Site Litigation* in order to:

- Provide an update regarding the forthcoming *January 2015 Disbursements*;
- Summarize information regarding additional case-specific expenses submitted by counsel; and
- Provide an opportunity for the Court to review information and offer guidance prior to finalization of the Payment Instruction Report for the forthcoming *January 2015 Disbursements*.¹

Within the scope of its role,² the Allocation Neutral is responsible to review certain expenses submitted by counsel prior to disbursement. Upon review, the Allocation Neutral noted that, in the aggregate, the amount of annual case-specific expenses submitted by Worby Groner Edelman & Napoli Bern, LLP (“WGENB”) related to the *January 2015 Disbursements* was relatively larger than that of past periods. As such, recognizing that timely disbursements are paramount, the Allocation Neutral requested additional time to diligently review additional information related to these case-specific expenses pursuant to the governing Allocation Neutral Procedure (“ANP”) documents and ethics standards referred to therein.³ WGENB was responsive and cooperative throughout this process, and provided additional information that further describes the expenses.

The Allocation Neutral has now concluded its review of expenses and is prepared to formulate a Payment Instruction Report encompassing *January 2015 Disbursements*. On the following pages, the Allocation Neutral summarizes the materials and information provided by counsel, so that the Court may review the

¹ See generally Order Regulating Distributions to Tier IV Plaintiffs And Fixing Attorneys' Fees, 21-mc-100, ECF No. 3196 (S.D.N.Y. January 16, 2015) (outlining the calculations and procedures to govern the *January 2015 Disbursements*).

² See, e.g., *id.* at 12-13 (“[T]he parties will continue to follow ANP-4, which calls for...the Allocation Neutral's reconciliation and audit of those accounts and any expenses...”).

³ See ANP-04 (“Protocol for Disbursing Proceeds to Claimants”), ANP-15 (“Protocol for Auditing Costs and Expenses”) (“The Allocation Neutral will only approve line-item expenses that comply with the cost and expense standards set forth by the American Bar Association’s Model Rules of Professional Conduct and Formal Ethics Opinions.”), and ANP-24 (“Additional Expense Procedure”) (collectively, the “ANP Documents”).



submitted expenses and related information, and provide guidance if it so chooses regarding the amount of allowable case-specific expenses prior to the circulation of the Payment Instruction Report.

Foundation: Materials Reviewed

As a preliminary matter, only WGENB submitted case-specific expenses to the Allocation Neutral in the context of the *January 2015 Disbursements*. The Allocation Neutral reviewed the following materials:

1. "WGENB_Case_Specific_Expenses_01092015" – a spreadsheet listing case-specific expense line items for individual WGENB clients;
2. "WGENB_CaseSpecificExpenses_Supplement_01122015" – a supplemental spreadsheet listing case-specific expense line items for individual WGENB clients;
3. "Zadropa Administrative Cost Batch Invoice" – a sample invoice regarding client document management expenses;
4. "InfoQwest_MC102_WTC_Invoice_20150121" – a sample of records regarding document management activities and expenses;
5. "CMM_Document_Imaging_Expense" – a spreadsheet listing expense rates for certain document management activities, such as scanning, optical character recognition ("OCR"), file formatting, indexing, and printing;
6. Sample invoices related to process of service and case evaluation by medical experts;
7. Certification that WGENB "certifies on behalf of his or her firm and to the best of his or her knowledge (1) that it has applied the court-ordered methodology found in Judge Hellerstein's order Protocol for Regulating Attorney's Fees and Allowances of Expenses dated June 25, 2010 (2) is in compliance with the terms of Exhibit 1 of this order Protocol for Disbursing Proceeds to Claimants ANP-04 and (3) that the cost and expense information included on the attached Disbursement Spreadsheet complies with cost and expense standards set forth by in the American Bar Association's Model Rules of Professional Conduct and Formal Ethics Opinions";
8. A sample Retainer Agreement;
9. "5-19-15 ltr to Garretson (Response to Expense Audit)" – a letter from WGENB to the Allocation Neutral describing certain expenses, compliance, and the relationship to the *September 11th Victim Compensation Fund* ("VCF," pursuant to the *Zadropa Act*); and
10. Numerous email messages from WGENB.

In addition, WGENB participated in several teleconferences to provide additional information and clarification.



Overview of ANP-4: Protocol for Disbursing Proceeds to Claimants

In its Order dated June 25, 2010, the Court delegated the function of review and audit as described by ANP-04 to the Allocation Neutral. ANP-04 states in part:

Each case within the World Trade Center Litigation Process is associated with its own individual expenses which can only be charged to that particular case ("Case-specific Expenses"). Case-specific Expenses include but are not limited to court filing fees for an individual case; obtaining a client's medical and employment records; past expert review of a client's medical records; and other expenditures specific to that individual case.

[...]

[T]he Court has delegated the function of review and audit to the Allocation Neutral and will not itself review the entire Case Expense file and corresponding Closing Statement per claimant.

Allowable expenses will be those expenses that are:

- a. reasonably-related to the advancement of any plaintiff's case;
- b. customarily expended on behalf of plaintiffs in personal injury cases; and,
- c. charged to plaintiffs at no greater rate than those rates customarily charged by outside vendors for such services.

[...]

As waves of claimants are approved for disbursement, Plaintiffs Counsel shall apply the Allowed Fees and Allowed Expenses methodology, and provide a Disbursement Spreadsheet to the Allocation Neutral with certification that the methodology has been applied appropriately. This Disbursement Spreadsheet shall contain the following columns per claimant:

- a. Allowed Attorney Fee Amount,
- b. Allowed Total Reimbursable Case Costs, and
- c. Net Proceeds to be Distributed to the Claimant.

For each Payment Type, the Allocation Neutral shall conduct a limited audit to validate that the Court-approved methodology was properly applied. In support of this audit, the Allocation Neutral shall randomly select up to 5% of claimants associated with each Payment Type (not to exceed 100 per Payment Type per firm). These randomly-selected claimants may be associated with multiple Disbursement Waves. Plaintiff Counsel shall provide the Allocation Neutral with



Plaintiff Counsel's full client "Closing Statements" for such randomly-selected claimants, and supporting documentation as required by the Courts order...

Overview of ANP-15: Protocol for Auditing Costs and Expenses

ANP-15 states in part:

II. Establishing Benchmark Expense Ranges

The Allocation Neutral will thoroughly review the line-item expenses from a sample of participating Primary Plaintiffs from each of the four Tiers⁴ and will establish benchmark expense ranges for each type of expense within each Tier based on the results of its review. Upon receipt of each Disbursement Spreadsheet, the submission of which is required as per the Regulation Order, the Allocation Neutral will review and apply the benchmark expense amount ranges against the submitted Disbursement Spreadsheets as they are received. Expenses that fall outside of the benchmark expense ranges will be subject to a thorough review by the Allocation Neutral.⁵

[...]

III. Acceptable Types of Expenses

The Allocation Neutral will only approve line-item expenses that comply with the cost and expense standards set forth by in the American Bar Association's Model Rules of Professional Conduct and Formal Ethics Opinions. Examples of such acceptable costs and expenses include, without limitation, costs and expenses for the following items:

- Court filing
- Process serving
- Expert witnesses
- Medical examinations/testing
- Medical reports/records
- Court stenography/transcription

⁴ Expenses submitted for *January 2015 Disbursements* are associated with Tier IV plaintiffs.

⁵ Of note, WGENB provided two spreadsheets entitled "WGENB_Case_Specific_Expenses_01092015" and "WGENB_CaseSpecificExpenses_Supplement_01122015" that listed all case-specific expenses for each WGENB client allocated funds pursuant to the *January 2015 Disbursements*. Because the Court has already established the Allowed Attorney Fee Amount, these spreadsheets provide the data required to calculate Net Proceeds to be Distributed to the Claimant, and to proceed to formulate Disbursement Statements and the Payment Instruction Report, subject to guidance by the Court.



- Discovery (e.g. deposition, interrogatory, etc.) costs
- Computer-assisted research
- Meals during travel relating to individual cases
- Express mail
- Postage
- Delivery/courier service
- Photocopying
- Printing
- Long distance telephone charges

Lobbying expenses, public relations consultants, and other attorney consultants shall not be considered acceptable costs and expenses...

IV. Audits by the Allocation Neutral

As per the Regulation Order, the Allocation Neutral will conduct a limited audit of the costs and expenses of up to 5% of the Primary Plaintiffs associated with each Payment Type (not to exceed 100 plaintiffs per Payment Type per firm), to be selected randomly. Upon the Allocation Neutral's request, plaintiffs' counsel shall submit complete financial records to the Allocation Neutral supporting the costs and expenses subject to such audits. The Allocation Neutral will then review the financial records for the following: (1) unacceptable types of expenses, (2) material inconsistencies with each plaintiff's Disbursement Spreadsheet, (3) any costs or expenses that exceed the benchmark expense ranges that it established, and (4) any materially inconsistent records or claimed expenses that materially exceed the amounts supported by the financial records.

Overview of ANP-24: Additional Expense Procedure

ANP-24 states in part:

III. Additional Expenses

Additional Expenses shall be defined as expenses not included in Original Expenses.

All Additional Expenses are subject to review by the Allocation Neutral...

Additional Case-specific and General Expenses do not require invoices at the time of submission, but the Allocation Neutral reserves the right to request supporting documentation in instances



where additional Case Specific and General expenses appear unreasonable pursuant to ANP – 15. Payment shall be held for those claimants until such supporting documentation is reviewed by the Allocation Neutral.

All Additional Expenses must be submitted with a signed Expense Certification Letter, certifying that these Additional Expenses comply with the Court's order dated June 25, 2010 and ABA ethical guidelines.⁶

Relative Increase in Annual Expenses

Upon preliminary review, the Allocation Neutral noted an increase in the amount of case-specific expenses submitted by WGENB between 2014 and 2015. In 2014, such expenses were \$168,941.75. In 2015, such expenses are \$891,713.70. The two tables on the following page summarize expenses submitted by WGENB in periods ending in 2015 and 2014 respectively.

⁶ Such certification was provided by WGENB.



Figure A: Comparison of Annual Expenses Submitted by WGENB

2015 WGENB Case-specific Expenses		2014 WGENB Case-specific Expenses	
Calendar Service Costs	\$185.40	Client Communication	\$6,598.81
Client Communication	\$108.50	Court Filing Fees	\$30,368.34
Client Data - Copy Costs to Transfer File to Incoming Counsel	\$121,594.76	Document Management Imaging Cost	\$594.00
Client Images - Copy Costs to Transfer File to Incoming Counsel	\$151,560.00	Government Lien Administrator Cost	\$4,250.00
Court Filing Fees	\$494.00	InfoQwest - Claim Resolution Service	\$7,224.04
Document Management Imaging Cost	\$436,444.10	InfoQwest - Document Production Expense	\$7,869.05
Document Management Indexing/Routing Cost	\$10,291.17	Investigation Cost - Accurant People Tracker	\$575.00
Document Management OCR Cost	\$114,861.91	Medical Records Expense	\$20,867.65
Document Management Printing Cost	\$31,662.58	Overnight Mail Expense	\$53.70
Expert Costs (Retainers and Charges)	\$1,789.48	Photocopying - Case Specific Expense	\$13,686.79
Investigation Cost (Investigators)	\$3,245.00	Postage Expense - General	\$815.57
Lien Administrator Cost	\$1,950.00	Service of Process Expenses	\$170.00
Overnight Mail Expense	\$53.70	Special Master Fees/Settlement Administrator Fees	\$75,868.80
Photocopying - Case Specific Expense	\$165.50	2014 Total	\$168,941.75
Postage Expense - General	\$207.19		
Probate Expense	\$16,556.98		
Reporting Service	\$256.65		
Travel Expense	\$286.78		
2015 Total	\$891,713.70		

As highlighted in Figure A, the relative increase in annual case-specific expenses submitted by WGENB can be largely attributed to two broad categories of expenses:

1. "Copy Costs to Transfer File to Incoming Counsel" – highlighted in blue ("Copy Costs"); and
2. "Document Management" expenses such as imaging, indexing, routing, OCR, and printing – highlighted in green ("Document Management Costs").

Together, these case-specific expenses constitute over 97% of total expenses submitted by WGENB (\$866,414.52 of \$891,713.70). As such, the Allocation Neutral focused its review on these expenses.



Cause of Increase in Annual Case-specific Expenses

WGENB describes the cause of the relative increase in case-specific expenses:

The additional expenses for copying that were recently submitted for recovery from the 2015 Captive Contingent and Bonus payments consisted generally of the following two types of copying costs (1) copying costs not previously submitted and (2) copying costs to transfer files to substituting counsel who is handling the 9/11 VCF.

The additional copying costs were previously not submitted due to an error in generating the proper report that captures this data. The copying costs associated with the substitution of counsel for the 9/11 VCF claims started to occur around 2011 and continues to this day.⁷

“Soft Costs”

WGENB indicated that Copy Costs and Document Management Costs were predominantly “Soft Costs.” For purposes of this memorandum, “Soft Costs” are defined as case-specific expenses:

1. Associated with in-house activities, employees, and resources (as opposed to outsourced);
2. For which no direct expenditure or disbursement was made or paid by WGENB (e.g., to a third-party payee); and
3. In turn, for which no invoice is often available, but rather activities may be internally tracked (e.g., number of pages photocopied or fields subjected to OCR).

For purposes of this document, Soft Costs equal the sum of Copy Costs and Document Management Costs (\$866,414.52).

WGENB provided a schedule of “per page charges that WGENB recovers as soft costs on the in-house document management work, i.e. scanning, ocr-ing, and indexing...”⁸ WGENB added, “These costs are similar to soft photocopy costs where a lawyer typically may charge a per page cost for copying a paper document.”⁹

⁷ Email from Chris LoPalo, Attorney, Worby Groner Edelman & Napoli Bern LLP, to the Allocation Neutral (February 12, 2015 17:56 EST) (on file with author).

⁸ Email from Chris LoPalo, Attorney, Worby Groner Edelman & Napoli Bern LLP, to the Allocation Neutral (April 16, 2015 7:23 EST) (on file with author).

⁹ *Id.*



Ethical Standards Regarding Expenses Related to Photocopy and Document Management Costs

Before reviewing line-item expense records associated with Soft Costs (e.g., photocopy costs), the Allocation Neutral first reviewed ethics guidance regarding recovery of Soft Costs as case-specific expenses.

Rule 1.5 of the ABA Model Rules of Professional Conduct offers guidance:

RULE 1.5: FEES

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses...
- (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.¹⁰

The comments to Rule 1.5 provide additional guidance:

Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.¹¹

It is unclear from the text of this guidance whether “the cost incurred by the lawyer” includes Soft Costs, or whether the guidance is referring to only actual direct expenditures (cash outflows) to external vendors. ABA Formal Ethics Opinion 93-379 (“Billing for Professional Fees, Disbursements and Other Expenses”) provides similar guidance:

A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; however, *the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial*

¹⁰ Model Rules of Prof'l Conduct R. 1.5.

¹¹ Model Rules of Prof'l Conduct R. 1.5 cmt. 1.



overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered.¹²

Again, although the guidance refers to “services performed in-house,” the guidance provides examples typically associated with actual direct expenditures (cash outflows) to external vendors. For example, a third-party invoice and / or direct out-of-pocket expense may be typically incurred per transaction for special delivery service, long distance telephone calls, secretarial overtime, and certain computer research. The ABA declined to provide further guidance:

It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.¹³

Thus, current ethical standards are unclear regarding whether Soft Costs such as in-house photocopying expenses may be charged to the client, *if the client has not otherwise agreed in advance*.¹⁴

Benchmarks: Reasonable Expenses

Current ethical standards allow recovery of “a reasonable amount to which the client has agreed in advance or ... an amount that reasonably reflects the cost incurred by the lawyer.”¹⁵ In turn, the Allocation Neutral established benchmark standards based on activity-based rates, expense ratios, and ethics guidance in order to evaluate whether the expenses submitted by WGENB are in compliance with the governing ANP documents and ethics standards referred to therein.

¹² ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379, 1 (1993) (entitled “Billing for Professional Fees, Disbursements and Other Expenses”).

¹³ *Id.* at 5.

¹⁴ A sample of the relevant retainer agreement was provided by WGENB and is available for review by the Court upon request.

¹⁵ Model Rules of Prof'l Conduct R. 1.5 cmt. 1.



WGENB provided activity-based expense rates associated with Soft Costs (i.e., rates for scanning, OCR, file formatting, indexing, and printing). These rates were outlined in the spreadsheet entitled “CMM_Document_Imaging_Expense”:

Figure B: Activity-based Expense Rates Applied by WGENB

Scanning Charge	\$.07 / page
OCR Charge	\$.02 / field
File Conversion Charge	\$.03 / page
Index Charge:	\$.03 / page
Printing Charge	\$.03 / page

Benchmark. According to research of the Allocation Neutral, the usual and customary rates for document imaging costs range from \$.035 to \$.25 per page for tasks such as document preparation, paper organization, verifying the results of the scan, indexing, and other related tasks. These costs vary in complexity of job, amount of documents scanned, and long term contracts between client and vendor. Costs for OCR scanning range on average from \$.015 to \$.02.

In the context of an aggregate settlement, aggregate expenses and expense ratios may also be reviewed in order to evaluate total expenses. The *January 2015 Disbursements* encompass the following aggregate amounts:

Figure C: Aggregate Expenses Amounts and Ratios

Total WGENB Tier IV Plaintiff Count	4,715
Total 2015 WGENB Tier IV Plaintiff Case-specific Expenses (“WGENB Expenses”)	\$891,713.70
Total January 2015 Disbursements related to WGENB Plaintiffs	\$7,815,139.54
Total Disbursements since Inception related to WEGNB Tier IV Plaintiffs ¹⁶	\$483,370,417.57
Average Gross Award per Tier IV Plaintiff for January 2015 Disbursements	\$1,657.51
Average Gross Award per Tier IV Plaintiff since Inception	\$102,517.59
Average WGENB Expenses per Plaintiff	\$189.12
Expense Ratio: WGENB Expenses / Total WGENB January 2015 Disbursements	11.41%
Expense Ratio: WGENB Expenses / Total Disbursements since Inception	0.1845%

Benchmark. For comparison, the Allocation Neutral reviewed case-specific expense ratios in one recent mass tort settlement. The sample encompassed three firms participating in aggregate settlement of complex multidistrict litigation involving personal injury claims of 4,941 plaintiffs. In this sample, case-specific expenses constituted approximately 2.36% of the gross aggregate settlement amount. While the sample provides a benchmark, the sample is distinguishable from the case before this Court due to scale

¹⁶ Including the *January 2015 Disbursement*.



of settlement and fees – in the sample matter, the combined aggregate settlement value divided among three firms was \$181,119,000.04.

The Soft Costs submitted by WGENB were incurred over several years, and should be reviewed in context of all payments to plaintiffs, not just the *January 2015 Disbursements*. In this context, the expenses submitted by WGENB are 0.1845% of the cumulative payments to those same plaintiffs. This ratio is lower than the benchmark of 2.36%, notwithstanding the difference in scale.

Review of Line-item Expense Records

WGENB provided two spreadsheets showing line-item case-specific expenses records. A sample of each, including fields and sample values, is reproduced below:

Figure D: Sample of Expense Spreadsheet (“WGENB_Case_Specific_Expenses_01092015”)

ClaimID	Case_Num	FileNo	Plaintiff	Total	GL_Code	GL
C0A652CD37F0794E	WTC005379	2948	[redacted]	\$63.48	108	Document Management Imaging Cost
C0A652CD37F0794E	WTC005379	2948	[redacted]	\$1.61	111	Document Management Indexing/Routing Cost
C0A652CD37F0794E	WTC005379	2948	[redacted]	\$16.71	109	Document Management OCR Cost
C0A652CD37F0794E	WTC005379	2948	[redacted]	\$7.45	127	Document Management Printing Cost
CD448352E65FD8DA	WTC007242	10531	[redacted]	\$91.84	108	Document Management Imaging Cost
CD448352E65FD8DA	WTC007242	10531	[redacted]	\$1.80	111	Document Management Indexing/Routing Cost
[...]						

Sum: \$618,558.94

Figure E: Sample of Expense Supplement (“WGENB_CaseSpecificExpenses_Supplement_01122015”)

ClaimID	Case_Num	File_No	Plaintiff	Total	GL_Code	GL	GL New
C0A652CD37F0794E	WTC005379	2948	[redacted]	23.126	130	Client Data	Client Data - Copy Costs to Transfer File to Incoming Counsel
C0A652CD37F0794E	WTC005379	2948	[redacted]	40	131	Client Images	Client Images - Copy Costs to Transfer File to Incoming Counsel
CD448352E65FD8DA	WTC007242	10531	[redacted]	26.49	130	Client Data	Client Data - Copy Costs to Transfer File to Incoming Counsel
[...]							

Sum: \$273,154.76



Of note, due to the nature of Soft Costs, there are limited additional supporting materials (“proof”) available to verify the underlying activity and expenses. For example, in certain circumstances, no invoice is available because the activities were internal to WGENB and no outside vendor or immediate cash expenditure was involved. Notwithstanding the nature of Soft Costs, there is no question that WGENB incurred actual expense (equipment lease, labor, etc.) in copying and document management activities.

Further, the Allocation Neutral currently has a limited basis to determine whether any particular expense records are duplicative. Identical records (duplicate records) may exist per plaintiff, however, the records may reflect legitimate and identical activity to advance a case.

“Costs to Transfer File to Incoming Counsel” and Other 102 Defendant Cases

A review of line-item expenses prompted these two additional key considerations:

1. *Transfer to VCF* – Certain Soft Costs submitted have been incurred in order to transfer files to new counsel handling VCF claims; and
2. *Expenses Incurred in Cases Against Other Defendants in 21 MC 102* – Certain Soft Costs submitted may have been incurred to advance claims against defendants other than the WTC Captive before a different court within the 21 MC 102 docket (“Other 102 Defendant Cases”).

The descriptions of the general ledger categories shared by WGENB provide additional information:

The business purpose for each GLCode/Description and vendor is as follows:

- Calendar Service Costs – messenger and process server – Infoquest
- Client Communication – information for client - infoquest
- Court Filing Fees – court petitions to resolve claims – Court
- *Document Management Imaging Cost – File Scanning for file preservation and transfer – Infoquest*
- *Document Management Indexing/Routing Cost – file sorting for preservation and transfer – Infoquest*
- *Document Management OCR Cost – file formatting for searchability – Infoquest*
- *Document Management Printing Cost – file duplication for file preservation and transfer – Infoquest*



- *Expert Costs (Retainers and Charges) – expert fees for claims being pursued against non settling defendants – Expert*
- Investigation Cost (Investigators) – research for missing clients – Infoquest
- Lien Administrator Cost – lien resolution – Garretson
- Overnight Mail Expense – important transport of information – Post office
- *Photocopying - Case Specific Expense – file duplication, preservation and transfer - Infoquest*
- Postage Expense – General - transport of information
- Probate Expense – court fees for probate administration – Surrogate’s Court
- Reporting Service – court reporter fees for transcripts – Court Reporter
- Travel Expense – law firm employee travel to court/meetings - employees of firm.¹⁷

WGENB clarified further:

The recent increase in expenses had to do with a major file transfer project. Copies of these plaintiffs files were sent to plaintiffs’ new counsel in order to pursue claims with the 9/11 Victims’ compensation claims.¹⁸

WGENB produced invoices for certain activities related to transferring case materials to the VCF. The plaintiff’s name has been redacted in the following sample:

Zadropa Administrative Cost Batch Invoice				Sunday, April 22, 2012
Barasch McGarry Salzman & Penson				
8971 [REDACTED]				
Client Data				
Total Fields:	23730	Total Pages:	0	Total: \$47.46
Client Images				
Total Fields:	0	Total Pages:	5866	Total: \$1,173.20
				Total: \$1,220.66

Pursuant to the agreement between counsel, these costs were negotiated at arms length and represent the reasonable administrative costs associated with the orderly transfer of the file on this and other matters. No part of this administrative cost amount will be charged to the clients of WGENB, NB or the new associated counsel. By accepting this client's file Michael Barasch and Noah Kupkesky on behalf of themselves and their firms jointly agree that these costs are within the guidelines set by the Zadropa VCF Special Master and her current Regulations. As a courtesy to the new associated counsel these costs will be due at the time of the first payment, if any, from the Zadropa funds.

¹⁷ Email from Chris LoPalo, Attorney, Worby Groner Edelman & Napoli Bern LLP, to the Allocation Neutral (February 03, 2015 12:26 EST) (emphasis added) (on file with author).

¹⁸ *Id.*



The footnote of the *Zadroga Administrative Cost Batch Invoice* states:

Pursuant to the agreement between counsel, these costs were negotiated at arms length and represent the reasonable administrative costs associated with the orderly transfer of the file on this and other matters. No part of this administrative cost amount will be charged to the clients of WGENB, NB or the new associated counsel. By accepting this client's file Michael Barasch and Noah Kupfkesky on behalf of themselves and their firms jointly agree that these costs are within the guidelines set by the Zadroga VCF Special Master and her current Regulations. As a courtesy to the new associated counsel these costs will be due at the time of the first payment, if any, from the Zadroga funds.

Other 102 Defendant Cases. WGENB indicated that Soft Costs may also include photocopy and document management expenses incurred in order to advance their clients' cases against other defendants in the 21 MC 102 docket (i.e., defendants other than the WTC Captive). WGENB clarified that their firm will continue to represent these clients in Other 102 Defendant Cases.

In the context of Other 102 Defendant Cases, WGENB noted that it is customary and ethical for an attorney to charge expenses against available settlement funds, including settlement funds recovered pursuant to a separate case involving the same client. That is, counsel explained that if the client and lawyer engage in separate cases against defendant A, B, and C, and incur case-specific expenses in each, the lawyer may ethically apply expenses against settlement proceeds of any case for the same client (assuming this comports to the retainer agreement).

While the Allocation Neutral seeks guidance and defers to the Court, the Allocation Neutral reviewed the submitted expenses according to the standards of the ANP Documents. The expenses may be said to be "reasonably-related to the advancement of any plaintiff's case"¹⁹ – albeit not the cases against the WTC Captive.

It is beyond the scope of the role of the Allocation Neutral to evaluate and determine whether the expenses are allowable in another forum and are not duplicatively assessed by each lawyer in each case.

In light of this background, the Allocation Neutral seeks guidance from the Court whether Soft Costs associated with 1) transferring cases to new counsel handling the VCF claims and 2) advancing clients' cases against other defendants in the 21 MC 102 docket (i.e., defendants other than the WTC Captive) are allowable.

¹⁹ Protocol for Regulating Attorneys' Fees and Allowances of Expenses, Nos. 21-mc-100, 21-mc-102, 21-mc-103, ECF No.2111 (S.D.N.Y. June 25, 2010) (authorizing Allocation Neutral Procedure 4, the "Protocol for Disbursing Proceeds To Claimants").



Conclusion

Upon initial review, the Allocation Neutral identified an increase in the amount of case-specific expenses submitted by WGENB between 2014 and 2015. In turn, within the scope of its role, the Allocation Neutral independently reviewed the facts and materials cited herein. Now, prior to circulation of the Payment Instruction Report:

1. The Allocation Neutral seeks guidance regarding whether Soft Costs submitted are allowable pursuant to the governing ANP documents and the ethics standards referred to therein;
2. The Allocation Neutral seeks guidance regarding whether certain Soft Costs associated with transfer to the VCF matter are allowable; and
3. The Allocation Neutral seeks guidance regarding whether Soft Costs incurred to advance claims against other defendants in the 21 MC 102 docket are allowable.

Pending guidance, the Allocation Neutral is prepared to issue a Payment Instruction Report associated with the *January 2015 Disbursements*. The Allocation Neutral now seeks to provide all available information to the Court, and provide an opportunity for the Court to exercise its discretion to determine whether the case-specific expenses submitted are reasonable and allowable, prior to circulating the forthcoming *Payment Instruction Report*. In turn, the Allocation Neutral will apply such guidance and circulate the payment instructions to counsel in accordance with past practice, the ANP Documents, and the authority of the Court.

Respectfully,

Joseph D. Juenger
On Behalf of the Allocation Neutral
The Garretson Resolution Group, Inc.